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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LORENZO RODRIGUEZ, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

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18 MP

QUESTION PRESENTED

Whether a criminal defendant's motion to dismiss for violation of the Speedy Trial Act tolled the statutory act's 70 day limit to bring defendant to trial.

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LORENZO RODRIGUEZ, Petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 7, 1994.

I.

QUESTION PRESENTED

Whether a criminal defendant's motion to dismiss for violation of the Speedy Trial Act tolled the statutory act's 70 day limit to bring defendant to trial.

II.

PARTIES

Lorenzo Rodriguez, Petitioner, by and through L. Aron Pena, Esq.

The United States of America, Respondent by and through Gaynelle Griffith Jones, Esq.; United States Attorney for the Southern District of Texas.

III.

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V.

OPINIONS BELOW

The August 25, 1994 opinion of the Court of Appeals whose judgment is sought to be reviewed, is reported in No. 92-7349, Slip Op. at 6322 and is reprinted in the separate appendix to this petition.

VI.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and S. Ct.R. 10.1(a)

VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Speedy Trial Act (18 U.S.C. sec. 3161) which is copied in the Appendix to this

brief.

VIII.

STATEMENT OF THE CASE

A. **Facts**

A grand jury indicted Petitioner on April 23, 1990, with other defendants, as one charge of conspiracy to possess marihuana with intent to distribute in violation of 21 U.S.C. §§846, 841 (a)(1) and 841 (b)(1)(B). This indictment was the third of three indictments.

After several delays, none caused by appellant, the multi-defendant case went to extended trial. This Appellant was found guilty of the charged count.

Appellant was believed to have been a worker-loader of one shipment of extensive marijuana shipping conspiracy. He was also said to have been with the one particular vehicle

and loan to 1834 loads. This, however was not known to the government for sometime, as debriefed government informants did not identify to the case-agents. He was not named in the first two indictments and even the third grand jury had no evidence upon which to return the indictment.

However, at the trial of several cooperating witnesses (paid informants) identified Appellants as being there.

The Government's unjustifiable delays were in direct violation of the Speedy Trial Act.

B. **The Rulings Below**

The district court denied Petitioner's Motion to Dismiss by Reason of Delay. The jury returned a verdict of Guilty against Petitioner and the Court entered judgment on the verdict sentencing Petitioner to 92 months in the Custody of the U.S. Bureau of Prisons.

The Court of Appeals affirmed Petitioner's conviction and the trial court's denial of the Motion to Dismiss by Reason of Delay. The Court of Appeals ruled that Petitioner's Motion tolled the Speedy Trial clock a month. (Panel Op. at 53.) The Court of Appeals also found that co-defendant's James motions also tolled the clock. The Court of Appeals denied Rodriguez's Petition for Rehearing on October 7, 1994.

IX.

REASON FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals for the Fifth Circuit departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A.

The Speedy Trial Act was violated by Continued Postponement in the Trial Court.

1.

Petitioner Insisted on his Speedy Trial Rights

On December 22, 1991, Appellant filed and urged his Motion to Dismiss for violation of his statutory and constitutional rights to a speedy trial. The tactic of the government was simply to procure a series of identical

indictments (with minimal changes) which caused postponement after postponement, over this Appellant's objection. Appellant had no pre-trial motions, which would call for excusable delay. Many other defendants were in the case; however, Appellant asked for severance and trial without delay.

The Speedy Trial Act is very precise on its trial limits, and violation of this right was only one of many other violations caused by the Government's election to slowly add defendants to this cause. However, from the onset of proceedings, this Appellant asserted his speedy trial rights. U. S. vs. Palmer, 537 F.2d 1287 (C.A. 5, 1976).

2.

The Remedy for Violation of the Act is dismissal.

The remedy for violation of the Speedy Trial Act is

dismissal. 18 U.S.C. Sec. 3162(a)(2). The criminal defendant must move for dismissal. The burden then shifts to the Government to show an exception under 18 U.S.C. 3161(h). Following a December 9, 1991, postponement (due to a superseding indictment), the Petitioner moved for dismissal on December 12, 1991. The Court (Ricardo Hinojosa, J.) denied that motion.

B.

The Fifth Circuit's Holding that Petitioner's Motion to Dismiss Tolled Limits Guts the Act

The Fifth Circuit greatly departed from accepted judicial proceedings by holding the Petitioner's Motion to Dismiss tolled the Speedy Trial Act timeline. The Court's ruling greatly conflicts with the intent of the statute and would eviscerate it.

The Act clearly provides that a violation be remedied by a dismissal on Defendant's motion. A 18 U.S.C. §3162. A defendant who fails to request a dismissal waives his Speedy Trial Act rights. The intent of Congress was that a criminal defendant must affirmatively press his speedy trial rights. The Fifth Circuit's holding trumps Congress' intent by including the pendancy of a motion to enforce the Act in the calculas. Surely, Congress would not make the statutory right to a speedy trial unenforceable by creating an enforcement mechanism.

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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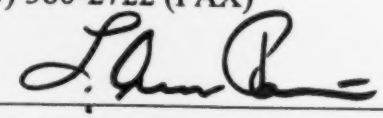
By: 
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CERTIFICATE OF SERVICE

I certify that I mailed a copy of this Petition for Writ of Certiorari to the following in accordance with the Rules of the Supreme Court:

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